

1 Nicholas Ranallo, Attorney at Law #275016  
2 2443 Fillmore St. #380-7508  
3 San Francisco, CA 94115  
4 Telephone No.: (831) 607-9229  
5 Fax No.: (831) 533-5073  
6 Email: [nick@ranallolawoffice.com](mailto:nick@ranallolawoffice.com)  
7 Attorney for Defendant

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**UNITED STATES DISTRICT COURT**  
**FOR THE SOUTHERN DISTRICT OF CALIFORNIA**  
**SAN DIEGO**

MALIBU MEDIA, LLC

Plaintiff,

v.

KEVIN PETERSON

Defendant

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KEVIN PETERSON

Counterclaimant

v.

MALIBU MEDIA, LLC

Counterdefendant

Case No. 3:16-CV-00786-JLS-NLS

**OPPOSITION TO PLAINTIFF'S  
MOTION TO DISMISS  
COUNTERCLAIM**

**Hearing Date: January 12, 2017 at 2:00 pm**

## I. INTRODUCTION

Plaintiff Malibu Media, LLC is one of the most prodigious litigants in the nation, filing over 4000 copyright lawsuits in the course of the last few years. Notably – with the limited exception of one instance where Plaintiff was forced to participate in a “bellwether trial”, none of these cases has made it to trial. Perhaps this is not surprising, as Plaintiff’s litigation strategy does not seek a ruling on the merits, but is instead (in the words of a federal judge) “essentially an extortion scheme” designed to leverage the high cost of federal litigation and the embarrassment associated with adult films into dubious settlements. See *Malibu Media, LLC v. John Does 1-10*, 2012 U.S. Dist. LEXIS 89286 at \*9 (C.D. Cal. June 27, 2012). When Plaintiff encounters a determined Defendant, it will seek to escape via the backdoor, in an effort to avoid the statutory costs and attorney fees available to a prevailing defendant in a copyright action. Defendant herein has interposed a counterclaim for declaratory relief, seeking to barricade the back door. Plaintiff – perhaps unsurprisingly – now seeks dismissal of this counterclaim in order to clear a potential escape path. For the reasons set forth herein, Defendant respectfully requests that Plaintiff’s Motion to Dismiss be denied.

## II. ARGUMENT

Plaintiff’s Motion to Dismiss Defendant’s Counterclaim cites two main rationale for why the Court should dismiss Defendant’s claim for a declaratory judgment, including that failure to do so would “confuse a jury,” and that answering Defendant’s four paragraph counterclaim would create an undue burden on the Plaintiff. Plaintiff goes on to argue that the counterclaim is unnecessary, “because the Court will decide the common copyright infringement issue unless the parties settle *or Plaintiffs withdraw their complaint.*” See ECF No. 16 at 4. This begins to get at the real issue in dispute.

Judge Alsup – who has been assigned all 100+ Malibu Media cases in the Northern District

1 of California and is intimately familiar with their tactics - recently examined and denied a nearly  
 2 identical Motion to Dismiss Defendant's Counterclaim. *See Malibu Media, LLC v. John Doe*  
 3 *Subscriber Assigned IP Address 76.126.99.126*, 2016 U.S. Dist. LEXIS 80003 (N.D. Cal. June 20,  
 4 2016). A copy of Judge Alsup's Order is annexed hereto as Exhibit A. The Northern District agreed  
 5 with Malibu Media that it had the authority to dismiss the counterclaim if it so chose, but nonetheless  
 6 denied Plaintiff's motion. The Court's rationale was persuasive, and Defendant urges the Court to  
 7 adopt it herein. Specifically, Judge Alsup noted that:

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 9 "Malibu Media argues that permitting defendant's counterclaim to proceed  
 10 would require it to file an answer in which it would deny all the allegations and  
 11 refer back to the complaint. This will, however, impose a negligible burden.  
 12 Malibu Media also contends the declaratory judgment counterclaim would  
 confuse a jury. Not really, however, a jury would never need to know that the  
 case involves an affirmative claim of infringement and a declaratory judgment  
 counterclaim of non-infringement. The jury could render one verdict resolving  
 both claims. Malibu Media will suffer no prejudice.

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 14 Malibu Media's motion seems more like a gimmick designed to allow it an  
 15 easy exit if discovery reveals its claims are meritless. Section 505 of Title 17  
 16 of the United States Code provides that a "prevailing party" may be awarded  
 17 attorney's fees in a copyright infringement action; however, when a copyright  
 18 plaintiff voluntarily dismisses a claim without prejudice, the defendant is not a  
 19 prevailing party. *Cadkin v. Loose*, 569 F.3d 1142, 1150 (9th Cir. 2009). Absent  
 defendant's counterclaim, if events reveal that this case is meritless, Malibu  
 Media could voluntarily dismiss its affirmative claims without prejudice under  
 Rule 41(a)(2), seeking to avoid an award of attorney's fees. If, however,  
 defendant's counterclaim remains alive, he will be able to press his  
 counterclaim.

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 21 *Malibu Media, LLC v. Doe*, No. C 15-04441 WHA, 2016 U.S. Dist. LEXIS  
 80003, at \*4-5 (N.D. Cal. June 20, 2016).

22 Defendant herein has little to add to Judge Alsup's observations. Defendant indeed seeks to  
 23 prevent Malibu Media from seeking an "easy exit" after it has finally determined to its satisfaction  
 24 that the Defendant is neither liable for infringement, nor likely to pay simply to make this matter go  
 25 away. Defendant likewise agrees that the purported rationale for Plaintiff's motion – the prevention  
 26 of jury confusion – is a feigned concern that is easily remedied by a proper instruction.  
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**III. CONCLUSION**

For the reasons set forth herein, Defendant respectfully requests that this Court deny Plaintiff's Motion to Dismiss.

DATED: November 1, 2016

NICHOLAS RANALLO, ATTORNEY AT LAW

By:                     /s/ Nicholas Ranallo                    

Nicholas Ranallo (Cal Bar # 275016)

2443 Fillmore Street, #380-7508

San Francisco, CA 94115

(831) 607-9229

Fax: (831) 533-5073

[nick@ranallolawoffice.com](mailto:nick@ranallolawoffice.com)

